

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2012-01-004
- vs -	:	<u>OPINION</u>
	:	10/1/2012
JEFFREY A. SMITH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2011CR0456

Donald White, Clermont County Prosecuting Attorney, David Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

R. Daniel Hannon, Clermont County Public Defender, Robert Benintendi, 10 South Third Street, Batavia, Ohio 45103, for defendant-appellant

POWELL, P.J.

{¶ 1} A defendant who pled guilty to kidnapping, aggravated burglary, and felonious assault seeks to overturn his convictions based on claims of merger, sentencing errors, and ineffective assistance of trial counsel. We affirm the defendant's conviction because merger was not required when kidnapping and felonious assault were committed separately with a separate animus, the trial court properly imposed consecutive sentences, and his trial

counsel was not ineffective on the merger issue.

{¶ 2} Jeffrey A. Smith was charged in Clermont County Common Pleas Court in connection with two separate events involving the same victim, Smith's former girlfriend. Smith was indicted for one count of attempted murder, two counts of kidnapping, four counts of aggravated burglary, two counts of felonious assault, one count of rape, and one count each of failing to provide notice of change of address and violating a protective order. Six of the counts carried a sexually violent predator specification and one kidnapping count also carried the additional specification that Smith committed the offense with a sexual motivation.

{¶ 3} As part of a negotiated plea, Smith pled guilty to one count each of kidnapping, aggravated burglary, and felonious assault in connection with the May 2011 incident at the victim's home. The remaining nine counts and all specifications of the indictment were dismissed.

{¶ 4} The trial court sentenced Smith to ten years each for both the kidnapping and burglary charges, and eight years on the felonious assault charge, with the sentences to be served consecutively to each other. Smith filed this appeal, presenting three assignments of error for our review.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED IN FAILING TO MERGE KIDNAPPING AND FELONIOUS ASSAULT FOR PURPOSES OF SENTENCING.

{¶ 7} Smith argues that he committed the kidnapping and the felonious assault together with the same animus, and, therefore, the two counts should have been merged for sentencing.

{¶ 8} According to the record, Smith pled guilty to kidnapping under R.C. 2905.01(A)(3), when by force, threat, or deception Smith removed the victim from the place where she was found, or restrained the liberty of the victim with the purpose to terrorize or to

inflict serious physical harm on the victim. Smith admitted to committing felonious assault by knowingly causing serious physical harm to the victim, in violation of R.C. 2903.11 (A)(1).

{¶ 9} At the plea hearing, the state read the language of the applicable counts of the indictment into the record, and provided the following facts:

[D]uring the early morning hours of May 10, 2011, the Defendant * * * kicked down a door to the victim's residence. The victim, who was asleep in her living room[,] woke to her door being kicked in. Smith then proceeded to beat the victim repeatedly about the head and body. * * * the Defendant stopped the beating to ask the victim for her keys. When she refused to tell him where her keys were, he found her purse and dumped its contents out on the victim's floor. The keys fell from the purse and he picked them up. The Defendant then dragged the victim out of her home as she was screaming, and attempted to force her into the victim's own car. * * * when the victim attempted to get away from the Defendant, he used a nail iron or a crowbar – a shorter version of a crowbar – to strike the victim repeatedly in the head and arms. The Defendant then fled the scene. The victim suffered severe injuries as a result of this second assault including lacerations to her head, brain damage, and two broken arms.

{¶ 10} Smith's counsel told the court that he acknowledged his conduct as described by the prosecutor, but disputed using the crowbar when he was striking the victim in the head.

{¶ 11} Ohio's statute concerning multiple counts, R.C. 2941.25, provides the following:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 12} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court established a new two-part test to determine whether offenses are allied offenses of

similar import under R.C. 2941.25. *State v. Craycraft*, 193 Ohio App.3d 594, 2011-Ohio-413, ¶ 11 (12th Dist.).

{¶ 13} If it is found that the offenses can be committed by the same conduct, courts must then determine whether the offenses were committed by the same conduct, i.e., a single act, committed with a single state of mind. *Johnson* at ¶ 49. If both questions are answered in the affirmative, the offenses are allied offenses of similar import and must be merged. *Id.* at ¶ 50. However, if the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has a separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. *Id.* at ¶ 51; *State v. Ayers*, 12th Dist. Nos. CA2010-12-119, CA2010-12-120, 2011-Ohio-4719.

{¶ 14} Smith argues the felonious assault and kidnapping were committed with the same conduct and same animus because the conduct constituting felonious assault was just an escalation of the force necessary to "bring the kidnapping to fruition," and not separate crimes.

{¶ 15} In arguing against merger, the state asserts that a kidnapping was already completed before the felonious assault when Smith assaulted the victim inside her home, demanded and eventually took her keys, and dragged the screaming victim outside and toward her car. When Smith was not able to force the victim into her vehicle, he violently beat her with the crowbar, which resulted in skull lacerations, brain damage, and two broken arms, all before fleeing.

{¶ 16} The trial court found that, based on the facts presented regarding Smith's conduct at the victim's residence, the two offenses were "committed separately and with a separate animus." Having reviewed Smith's conduct as presented by the facts read into the record, we agree with the state's argument and the trial court's conclusion that the felonious

assault and kidnapping offenses need not be merged as they were committed separately and with a separate animus. Smith's first assignment of error is overruled.

{¶ 17} Assignment of Error No. 2:

{¶ 18} THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE PRISON TERMS.

{¶ 19} Smith argues that the trial court failed to make the necessary statutory findings mandated by R.C. 2929.14(C)(4) prior to imposition of his consecutive sentences.

{¶ 20} With the enactment of Am.Sub.H.B. No. 86, effective September 30, 2011, the General Assembly revived the requirement that trial courts make findings before imposing consecutive sentences under R.C. 2929.14(C). *State v. Alexander*, 1st Dist. Nos. C-110828, C-110829, 2012-Ohio-3349; *State v. Snyder*, 3rd Dist. No. 13-11-37, 2012-Ohio-3069; see *State v. Frasca*, 11th Dist. No. 2011-T-0108, 2012-Ohio-3746; *State v. Bonner*, 8th Dist. No. 97747, 2012-Ohio-2931; see also section 11, Am.Sub.H.B. No. 86 (In amending [consecutive sentencing divisions] of R.C. 2929.14 and R.C. 2929.41 in this act, it is the intent of the General Assembly to simultaneously repeal and revive the amended language in those divisions that was invalidated and severed by the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1 [2006]).

{¶ 21} R.C. 2929.14(C)(4) provides a three-step analysis in order to impose consecutive sentences. *Snyder*, 2012-Ohio-3069 at ¶ 25. First, the trial court must find that consecutive sentencing is necessary to protect the public from future crime or to punish the offender. *Id.* Second, the trial court must find that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. *Id.* Third, the trial court must find that one of the following applies:

- (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or

2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Id.; R.C. 2929.14(C)(4).

{¶ 22} We also note that R.C. 2929.11, also amended by Am.Sub.H.B. No. 86, states that the "overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources."

{¶ 23} In the case at bar, the trial court stated that it reviewed Smith's presentence investigation report and considered the purposes and principles of felony sentencing under R.C. 2929.11, R.C. 2929.12, and R.C. 2929.13. The trial court observed that the victim suffered serious and possibly life-long injuries and noted the likelihood that Smith would reoffend, given that he perpetrated another "heinous offense" in 1989, for which he was sentenced to 11 to 25 years in prison. The trial court noted that Smith had other "limited prior convictions" before the 1989 crimes.

{¶ 24} The trial court stated that

If one were to think that – that you were able to be rehabilitated, then one would have thought that after serving a lengthy prison sentence that the least or the last thing that we would be back here on, Mr. Smith, is something involving a brutal beating, the brutal entering someone's home, the brutal kidnapping, the brutal beating of a person after – if we want to believe in humanity – after having been involved in something like that back in 1990.

[sic] * * * It should never happen again. And here we are once again because by your own admission at some point you can't control your own emotions, your own behavior. * * * We're now in a position where as I look at this picture or looked at this picture to see the damage that a person like you can cause to another human being whether it's a man or a woman. It's incomprehensible, Mr. Smith.

{¶ 25} The trial court further stated that:

The court will further note for the record that in relation to how you're sentenced, whether it's concurrent, whether it's consecutive, the court will point to Revised Code 2929.14(C)(4), which indicates, the court may impose consecutive sentences for felonies if it finds the following: consecutive sentence is necessary to protect the public from future or to punish future harm, or to punish the offender. That they're not disproportionate to the seriousness of the offender's conduct, or the danger the offender poses to the public, and if the court finds any of the following: whether the offender committed one of more of the multiple offenses while awaiting trial or sentencing, or while under a community control sanction, or a postrelease control sanction; at least two of the multiple offenses were committed as a part of one of more courses of conduct and the harm caused by two of more of multiple offenses were so great that no single prison sentence for any of the offenses committed adequately reflects the seriousness of the offender's conduct; or most appropriately, the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. [sic]

Having considered all of the statutory factors that the court is required to consider, having heard mitigation from your counsel, and from you, Mr. Smith, having heard from – from the State, having heard from the prior victim of the 1989 attack, and also of the attack for which the Court has to sentence you today, the court will impose the following sentence * * *.

{¶ 26} Smith argues that the trial court read the language of R.C. 2929.14(C)(4), which is not the same as making findings. A trial court satisfies the statutory requirement of making the required findings when the record reflects that the court engaged in the required analysis and selected the appropriate statutory criteria. See *Alexander*, 2012-Ohio-3349 at ¶ 16.

{¶ 27} A reviewing court may vacate consecutive sentences only if it clearly and convincingly finds either that the record does not support the trial court's R.C. 2929.14(C)(4)

sentencing findings or that the sentence is otherwise contrary to law. *Alexander* at ¶ 14, citing R.C. 2953.08(G)(2) and the "first prong" of *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912.

{¶ 28} Contrary to Smith's assertions, we find the trial court complied with the dictates of the newly amended R.C. 2929.14(C)(4) and made all the required findings to support the imposition of consecutive sentences. The record indicates the trial court found all of the statutory findings of R.C. 2929.14(C)(4) applicable. The record supports the findings relative to the first and second steps of the analysis provided by statute, i.e., to protect the public from future harm and to punish the offender, and the sentences are not disproportionate to the seriousness of the conduct or the danger the offender poses to the public.

{¶ 29} To the extent that the trial court found all three of the factors of the third step applicable, the record overwhelmingly supports the finding of the third factor, which the trial court itself stressed, when it stated that "most appropriately," the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 30} Smith also points out in his argument that the trial court failed to journalize any consecutive sentence findings in its sentencing entry. The Ninth Appellate District rejected the argument that a prison sentence should be reversed where the trial court failed to set forth the R.C. 2929.14(C) findings in its sentencing entry in *State v. Just*, 9th Dist. No. 12CA0002, 2012-Ohio-4094.

{¶ 31} The *Just* court noted that the General Assembly in 2011 Am.Sub.H.B. No. 86 reinserted language in R.C. 2929.14 requiring the court to make certain findings before imposing consecutive terms, but it excised the statutory terms in R.C. 2929.19 that required a court to make a finding that gives its reasons for selecting the sentence imposed. *Just* at ¶ 49; see *Alexander*, 2012-Ohio-3349 at ¶ 18 (trial court's obligation to "give its reasons" is now

gone from the sentencing statutes, and gone with it is the requirement that the trial court articulate and justify its findings at the sentencing hearing).

{¶ 32} The Ninth District noted that the current version of R.C. 2929.19 (applicable to its case and the case at bar) "now only requires a court to consider the record and other pertinent information before imposing a sentence and to include in its sentencing entry 'whether the sentences are to be served concurrently or consecutively.'" *Just* at ¶ 49; see R.C. 2929.19(B)(2)(b).

{¶ 33} The *Just* court found that

[A]lthough the General Assembly has expressed an intent that a trial court impose consecutive sentence only if it first finds that certain conditions exist, the General Assembly has eliminated the requirement that the court codify those findings in its sentencing entry. Because the trial court was not required to set forth its findings under R.C. 2929.14(C)(4)(a)-(c) in its sentencing entry, [appellant] is incorrect in his assertion his sentence is contrary to law. [sic]

{¶ 34} Given the fact that the amended statutes were effective on September 30, 2011, there is limited case law available dealing with these issues. However, we find the *Just* case persuasive and likewise find that the trial court in the instant case was not required to set forth its consecutive sentence findings in the sentencing entry.

{¶ 35} Accordingly, we find the trial court did not err in imposing consecutive sentences and Smith's second assignment of error is overruled.

{¶ 36} Assignment of Error No. 3:

{¶ 37} APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THE MERGER OF KIDNAPPING AND FELONIOUS ASSAULT AND FAILING TO OBJECT WHEN THE COURT SENTENCED APPELLANT TO BOTH.

{¶ 38} Smith acknowledges that the issue of merger of the kidnapping and felonious assault counts was argued before the trial court before sentencing, but now argues that his

trial counsel was ineffective because he did not adequately argue or sufficiently rebut the state's arguments against merger.

{¶ 39} In an ineffective assistance of counsel claim, a defendant must (1) demonstrate that his counsel's performance fell below an objective standard of reasonable representation, and if it did so (2) show that he was prejudiced by such deficient performance, i.e., that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-694, 104 S.Ct. 2052 (1984); *State v. Raleigh*, 12th Dist. Nos. CA2009-08-046, CA2009-08-047, 2010-Ohio-2966, ¶ 13.

{¶ 40} In order to prevail on a claim of ineffective assistance of counsel in a case involving a failure to successfully argue a motion on behalf of a defendant, the defendant must show that his argument or motion was meritorious, and that there was a reasonable probability that the verdict would have been different had the motion or argument been made. *See Raleigh* at ¶ 14; *see State v. Behanan*, 12th Dist. No. CA2009-10-266, 2010-Ohio-4403.

{¶ 41} As noted in the first assignment of error, we find that Smith committed the kidnapping and the felonious assault separately and with a separate animus, and was properly sentenced for both offenses. Smith would not be successful in his arguments to the contrary. Having found no error in our review of these issues, we cannot say that Smith's trial counsel was deficient or ineffective. Smith's third assignment of error is overruled.

{¶ 42} Judgment affirmed.

PIPER and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.